MAYBANK ISLAMIC BHD A

v.

KAMARULZAMAN MOHAMED NORDIN

HIGH COURT MALAYA, KUALA LUMPUR B
ASMABI MOHAMAD JC
[CIVIL SUIT NO: D-22A-589-2010]
7 JULY 2013

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether issues raised merited trial - Whether fit and proper case for summary judgment to be granted - Rules of Court 2012, O. 14* C

LIMITATION: *Summary judgment - Agreement - Claim for balance outstanding under housing loan - Absolute assignment of immovable property - Whether equitable mortgage - Whether time period applied was 12 years or six years - Whether action time-barred - Limitation Act 1953, ss. 6(1)(a), 21(1)* D

The plaintiff in the instant case prayed for summary judgment against the defendant for the balance outstanding under an Islamic housing loan after the property in question was auctioned off to recover the debt. The defendant defaulted after having paid only nine out of the 300 monthly instalments he had contracted to pay. Among the security documents the defendant executed to obtain the loan was a deed of assignment under which he had absolutely assigned all his rights, title and interest in the property to the plaintiff. He also signed a power of attorney irrevocably appointing the plaintiff as his attorney and giving it absolute power to deal with the property in any manner whatsoever including the power to transfer and/or dispose of it. In resisting the summary judgment application, the defendant, *inter alia*, contended that the plaintiff's action was time-barred under s. 6(1)(a) of the Limitation Act 1953 ('the Act') as it was filed more than six years after the date the plaintiff made a demand for repayment of the loan. E F G

Held (allowing claim):

(1) This was a straight forward and proper case to be disposed of by way of summary judgment under O. 14 of the Rules of Court 2012. The defendant had failed to raise any triable issue which merited a full-blown trial. (paras 19 & 39) H

(2) The plaintiff's claim was not barred by limitation. Its case was premised on the sale agreement cum assignment, the deed of assignment and the power of attorney and it involved the absolute assignment of the immovable property in respect of which there was no issue document of title, no registered charge and no deposit of I

document of title. As such, it was an equitable mortgage. The deed of assignment was a recognised mortgage under s. 21(1) of the Act. The time period that applied was therefore 12 years and not six years. The action was filed within the period provided under s. 21(1) of the Act. (paras 31, 33 & 35)

Case(s) referred to:

Bank Islam Malaysia Berhad v. Adnan Omar [1994] 3 CLJ 735 HC ***(refd)***
Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***
Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***
Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***
Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 CLJ 9; [1987] CLJ (Rep) 120 SC ***(refd)***
Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***
Malayan Banking Bhd v. Wembley Industries Holdings Bhd [2012] 5 CLJ 956 HC ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 CA ***(refd)***
Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(refd)***
Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), (5)(b), 21(1), (2)
Rules of Court 2012, O. 14 r. 2, O. 31, O. 83

For the plaintiff/applicant - Affah Maydiyah Mahmud; M/s Hari Abu Bakar & Jagjit
For the defendant/respondent - Syed Zakaria Syed Zainal Abidin; M/s Zakaria Zainal & Co

Reported by Ashok Kumar

JUDGMENT

Asmabi Mohamad JC:

Introduction

[1] This was a claim by the plaintiff against the defendant for the recovery of the sum of RM419,657.70 up to 28 February 2010 which was due and payable under the housing financing granted by the plaintiff to the defendant premised on the Shariah principle of financing known

as *Al-Bai Bithaman Ajil*. By a notice of application dated 4 January 2013 ("encl. 14") the applicant/plaintiff ("plaintiff") sought for a summary judgment to be entered against the respondent/defendant ("defendant") pursuant to O. 14 of the Rules of Court 2012 ("ROC"). A

[2] Upon perusal of the affidavits and the relevant submissions filed herein and upon hearing learned counsels for the plaintiff and the defendant, on 10 April 2013 this court allowed encl. 14 to be entered against the defendant with cost fixed at RM4,000. B

[3] Aggrieved by the said decision, the defendant appealed to the Court of Appeal Malaysia against the whole of the decision. C

The Application

[4] *Vide* encl. 14 the plaintiff sought, amongst others, summary judgment to be entered against the defendant for the sum of RM419,657.70 up to 28 February 2010, costs on solicitors-client basis, costs of this action and any other relief deemed fit by this court. D

[5] Other than the writ of summons and statement of claim dated 23 July 2010, statement of defence dated 5 December 2012, reply to defendant's defence dated 17 December 2012, the following affidavits were considered by this court: E

(a) The plaintiff's affidavit in support of encl. 14 affirmed by Rugayah binti Yusof on 4 January 2013 ("encl. 15");

(b) The defendants' affidavit in reply affirmed by Kamarulzaman bin Mohamed Nordin on 25 January 2013 ("encl. 16"); and F

(c) The plaintiff's affidavit in reply affirmed by Nor'ain binti Lokman on 15 February 2013 ("encl. 17").

[6] The grounds for the said encl. 14 were as stated in the affidavits of Rugayah binti Yusof affirmed on 4 January 2013 ("encl. 15") and Nor'ain binti Lokman affirmed on 15 February 2013 filed herein ("encl. 17"). In essence the plaintiff averred that there are no merits in the defendant's defence. Neither could the defendant raise triable issues to merit a full blown trial. G H

Background Facts

[7] The brief facts leading to the claim can be stated as follows:

(a) The plaintiff, Maybank Islamic Bhd is a licensed financial institution established under the Companies Act 1965 having its branch office at AG 1-2 & AG 9-10, Block A, Plaza Pekeliling 2, Jalan Tun Razak, 50500 Kuala Lumpur. Pursuant to an order of the court I

dated 12 December 2007, the plaintiff had purchased and received the vesting of the whole of the assets and liabilities in respect of Malayan Banking Bhd Islamic Financial businesses.

(b) The defendant had entered into a sale and purchase agreement dated 15 November 1997 with Bandar Sungai Buaya Sdn Bhd ("the vendor") and Murna Jaya Development Berhad ("the proprietor") in respect of a sale and purchase of a piece of land measuring 2,012 square feet in area together with a double storey terrace house to be erected thereon which address was at No. 3, Jalan Mawarsari 4, Bandar Sungai Buaya, 48010 Rawang Selangor Darul Ehsan under Master Title HS (D) 10780 & HS (D) 10781, PT 10454 & 10455, Mukim Serendah, Daerah Hulu Selangor, Selangor Darul Ehsan ("the said asset") at a purchase price of RM178,099 ("exh. RY5" of encl. 15).

(c) The defendant had applied to the plaintiff for a *Al-Bai Bithaman Ajil* housing financing in the sum of RM169,878 to part finance the asset for his own occupation. Pursuant to a letter of offer dated 18 November 1997 ("LO") ("exh. RY1" of encl. 15) the plaintiff had granted the defendant an *Al-Bai Bithaman Ajil* housing financing subject to the terms and condition contained in the said LO.

(d) Pursuant to the LO and a novation agreement dated 18 February 1998, Bandar Sungai Buaya Sdn Bhd as the vendor ("vendor") on its own behalf as well as the attorney to Murna Jaya Development Berhad ("the proprietor") of the one part had agreed to sell the said asset to the defendant for the sum of RM178,099. The plaintiff had agreed to become a party to the principal agreement in place of the defendant by executing the novation agreement for the purpose of immediately reselling the asset to the defendant upon deferred payment terms ("exh. RY2" of encl. 15). The full terms and conditions in respect of the novation agreement were as stipulated in the said novation agreement.

(e) On 18 February 1998 the plaintiff and the defendant had entered into a sale agreement cum assignment whereby the plaintiff had agreed to sell and the defendant had agreed to purchase the asset at the sale price of RM487,428.81 which sum shall be payable by the defendant by 300 monthly instalments of RM1,625 per month (see "exh. RY3" of encl. 15). The salient terms and conditions were as stipulated in the sale agreement cum assignment entered into between the plaintiff and the defendant.

(f) The defendant and the plaintiff had also executed the deed of assignment dated 18 February 1998 whereby the defendant as the beneficial owner had absolutely assigned all his rights, title, and interest whatsoever in and to the asset including all rights and interest of the defendant in the principle agreement to the plaintiff as security for the payment by the defendant to the plaintiff of the sale price under the sale agreement cum assignment and all other monies payable thereunder (see "exh. RY4" of encl. 15).

(g) On 18 February 1998 both the defendant and the plaintiff had executed the power of attorney whereby the defendant had irrevocably appointed the plaintiff as his attorney and giving the plaintiff absolute power to deal with the asset in any manner whatsoever including the power to transfer and/or dispose of the asset (see "exh. RY6" of encl. 15).

(h) Based on all documents executed by the defendant for the purpose of the above-mentioned housing financing, the defendant had accepted and had duly signed the documents mentioned herein at the respective column.

(i) The defendant had only paid nine monthly instalments out of the 300 monthly instalments he had agreed to pay pursuant to the LO and the sale agreement cum assignment executed by him. In terms of amount, the defendant had only paid the sum of RM14,625 out of RM487,428.81 of the sale price. The defendant had defaulted in his monthly installment for 11 months and a notice had been issued dated 11 March 2003. The same was received by the defendant ("exh. RY9" of encl. 15).

Issues Raised By The Defendant

[8] In his attempt to resist the plaintiff's application for the prayers sought pursuant to the application, the defendant raised the following issues:

(a) There was no certainty as regard to the sale price in respect of the sale agreement cum assignment as there was a discrepancy in the sale price stated in the said sale agreement cum assignment. The sale price as stated in the principle agreement was RM487,428.81 and the sale price that the defendant was required to pay was RM487,500. This figure was obtained by the defendant by multiplying 300 monthly instalments with the monthly payment of RM1,625. As such there were two sales prices. This according to the defendant was bad for want of certainty.

(b) There was no valid notice issued by the plaintiff to the defendant to notify the defendant of the various public auctions for the sale of the said asset. The plaintiff had admitted that there were no notices sent to the defendant to notify the defendant of the public auction despite the fact that the defendant had entered appearance in respect of the writ action filed by the plaintiff to claim for the outstanding sum pursuant to the sale agreement cum assignment. The notice was a mandatory provision. The plaintiff had failed to comply with this mandatory requirement. Therefore the public auction was irregularly conducted, null and void.

(c) Pursuant to a letter dated 15 May 2000, the plaintiff had agreed to reduce the interest rate in respect of the sale agreement cum assignment from 10% to 9.5%. The defendant had accepted the offer by way of a letter communicated to the plaintiff of his acceptance ("exh. KMN3" of encl. 16). The defendant had consistently queried the plaintiff over the issue of interest and the reason as to why the plaintiff had not considered the reduced interest rate in the calculation of the outstanding sum. However the plaintiff still maintained that the interest rate to be paid by the defendant to the plaintiff was 10% and not 9.5%.

(d) The plaintiff's certificate of indebtedness contained manifest errors which could not be remedied. The plaintiff failed to clarify to this court as to why there were discrepancies in the selling price. The selling price as stated in the sale agreement cum assignment and the LO was RM487,428.81 and the amount stated in the second schedule of the same sale agreement cum assignment was RM1,625 x 300 months which came up to a figure of RM487,500. There was a difference of RM21.19 in the sale price.

(e) The plaintiff's pleadings were defective, in that, there were discrepancies as regards the dates of the notices that were issued to the defendant. The plaintiff had failed to produce the notice dated 31 March 2010 but only notices dated 11 March 2003 and 5 May 2003 were exhibited. However the plaintiff had not pleaded in its SOC pertaining to the notices dated 11 March 2003 and 5 May 2003.

(f) The plaintiff's action was barred by the provision of s. 6(1)(a) of the Limitation Act 1953 ("the Act") as the plaintiff had commenced this action against the defendant after six years as provided in s. 6(1)(a) of the Act. The period of six years must be calculated from 11 March 2003 and not 31 March 2010 as was done in this case.

(g) Based on the foregoing, the defendant contended that this was not a fit and proper case to be summarily disposed by way of an O. 14 application. Hence the defendant urged this court to dismiss encl. 14 with costs and prayed for this matter to be set down for trial.

Issues Raised By The Plaintiff

[9] In response to the defendant's submissions, learned counsel for the plaintiff raised, amongst others, the following arguments:

(a) The defendants had failed to raise any triable issue which merited a full blown trial. Neither did the defendants raise a defence on the merits;

(b) The defendant had disputed the sale price as stated in sale agreement cum assignment after 16 years. There was only a negligible difference of RM21.19. The defendant, having signed the relevant documents had accepted the terms and conditions contain therein, could not at this stage dispute the contents of the documents. The defendant was bound by the terms and conditions of the sale agreement cum assignment which he had signed and duly accepted.

(c) The defendant had only paid nine monthly instalments amounting to RM14,625 out of the 300 monthly instalments stipulated in the LO and the sale agreement cum assignment. The defendant had defaulted in his monthly instalment for 11 months and a notice had been issued dated 11 March 2003. The same was received by the defendant ("exh. RY9" of encl. 15).

(d) There was no requirement for the plaintiff to issue fresh notices each time it intended to dispose of the asset by way of public auction as the auction process was not conducted pursuant to the Rules of the Court 2012 or a public auction conducted by the land office. The public auction in this case was conducted by the plaintiff pursuant to the sale agreement cum assignment, deed of assignment and the power of attorney (see "exh. RY3, exh. RY4 & exh. RY6" of encl. 15).

(e) The defendant had defaulted in making his monthly instalments under the sale agreement cum assignment and the deed of assignment, the plaintiff had exercised its rights to dispose of the asset by way of a public auction dated 16 June 2006 and all notices in respect of the said public auction had been duly served on the

defendant. The plaintiff was entitled to enforce the assignment or the charge without further notice to the defendant (see s. 7.02 of exh. RY3 of encl. 15).

(f) The asset was not able to be sold *via* the first five public auctions. However it was only on 16 June 2003 which was the sixth public auction that the plaintiff managed to dispose of the asset at the price of RM70,000 ("exh. RY7" of encl. 15). There was no requirement for the plaintiff to issues new notices of the public auction before the property was disposed of.

(g) The next issue raised by the defendant was that the plaintiff's action was barred by virtue of s. 6(1)(a) of the Act. The plaintiff's cause of action was to claim the shortfall which was still due and payable by the defendant. The plaintiff's claim was under the deed of assignment, and the sale agreement cum assignment the time within which the plaintiff was entitled to claim from the defendant was 12 years and not six years (s. 21 of the Limitation Act 1953). Section 21 of the Act would apply to this case.

(h) The plaintiff was entitled to claim the whole outstanding amount including "unearned profit" in event of default on the part of the defendant to settle the outstanding under the *Al-Bai Bithaman Ajil*.

(i) As regards the claim by the defendant that the plaintiff had not taken into consideration the reduction in the interest rate from 10% to 9.5%, the plaintiff submitted that this transaction being a BBA, there was no element of interest involved. Further the defendant had not responded to the letter issued by the plaintiff dated 15 May 2000. As the defendant had not acknowledged receipt of the offer for reduction by signing and returning the copy of the letter to the plaintiff, the defendant was taken not to have accepted the offer by the plaintiff for the reduction of the profit rate of 9.5%.

(j) The defendant had also challenged the "certificate of indebtedness" issued by the plaintiff and claimed that there were manifest errors in the said certificate. However the defendant had not discharged the burden to prove that there were manifest errors in the certificate of indebtedness (see cl. 11.03 of the sale agreement cum assignment).

(k) The defendant had failed to perform his obligation under the contract to ensure all instalment payments under the agreement were promptly made and in accordance with the sale agreement cum assignment.

The Law

[10] In *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283, the Federal Court had clearly laid down the preliminary requirements in an application for summary judgment under the O. 14 of the then Rules of the High Court 1980 (now the ROC) as follows:

(a) The defendant had entered appearance;

(b) The statement of claim must have been served on the defendant; and

(c) The affidavit in support of the application must comply with the requirements of r. 2 of O. 14. The application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim.

[11] Once the plaintiff had satisfied the three requirements as set out in the above quoted case, the plaintiff has established a *prima facie* case and is entitled to the judgment. The burden then shifted to the defendant to show the merits in the defence.

[12] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full blown trial, the matter ought to be resolved and decided in an O. 14 application. The court should only exercise the power under the said order in very clear cases (*Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; *Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 CLJ 9; [1987] CLJ (Rep) 120).

[13] In *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 His Lordship Raja Azlan Shah, CJ, (as His Highness was then) had stated as follows:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the Judge in Chambers, or, for that matter this court, shall not deal with the whole matter under the RSC Order 14 procedure.

[14] In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ the Supreme Court observed that:

> ...the requirement under O.14 for the Court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[15] In same case, the Supreme Court went on to state as follows:

> Apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue...

[16] In *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 the Court of Appeal held as follows:

> The underlying philosophy in the Order 14 provision is to prevent the plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied in cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should be exercised in very clear cases.

(see *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283).

Findings Of This Court

[17] It is important to bear in mind that when deciding an application under O. 14 of the ROC, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or *bona fide* defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision. In *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328 the Supreme Court held:

> It can hardly be emphasized that in order for the Court to arrive at a decision that a defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a Judge when

making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[18] With the above principles in mind I will now examine the documents before me in order to ascertain if the plaintiff was entitled to summary judgment as prayed in encl. 14 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue is triable. The determination of whether an issue is or is not triable would depend on the facts or the law as disclosed in the affidavit evidence before the court.

[19] Upon a perusal of the affidavits filed herein, I found that the defendant had failed to raise any triable issue which merited a full-blown trial.

Sales Agreement Cum Assignment Tainted With Uncertainty

[20] The defendant had disputed the sale price as stated in the sale agreement cum assignment after 16 years. The disputed figure was a negligible figure of RM21.19. The defendant who had signed the relevant documents had accepted the terms and conditions contain therein could not at a later stage dispute the contents of the documents. Therefore the defendant was bound by the terms and conditions of the sale agreement cum assignment which he had signed and duly accepted. Once the defendant had executed the acceptance of the LO and all related documents as had been shown in this case, the defendant was deemed to have read, understood and accepted the terms and conditions of these documents (see the case of *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735).

[21] In this case, the parties have voluntarily agreed to be bound by the terms and conditions of specific agreements as mentioned before. The defendant has also agreed to be bound by some mechanism and process to give effect to the ultimate intention of the parties.

[22] His Lordship Visu Sinnadurai J in *Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ observed at p. 147 as follows:

The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that even if a party to a contract has not read the contents of a contract, he is held to be bound by its terms. In the leading case of *L' Estrange v. F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p. 404).

A When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[23] The same position also applies to Islamic transactions. Shariah B orders that obligations and contracts be fulfilled:

i. "O ye who believe! Fulfill all obligations". (*Surah al-Maidah*, 5.1);

ii. "And fulfill (every) obligation, for [every] obligation will be inquired into [on the day of Reckoning]" (*Al-Isra'*, 17.34);

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iii. "Muslim are bound by their conditions" (*Al Bukhari, sahih*, vol. XIII "*Kitab al-Shurut*", *al-Mat ba'ah Masriyah*, 1934, p. 289).

Breach Of The Terms Of The Agreements

D **[24]** The defendant had breached s. 2.01 of the sale agreement cum assignment, in that, he had failed to perform his obligation under the contract to ensure all instalment payments under the sale agreement cum assignment were promptly made and in accordance with that agreement. The defendant had only paid nine monthly instalments amounting to RM14,625 out of the 300 monthly instalments ie, RM487,428.81 (the E sale price) stipulated in the LO and the sale agreement cum assignment. The defendant had defaulted in his monthly instalment for 11 months and a notice had been issued dated 11 March 2003. The same was received by the defendant on 12 March 2003 ("exh. RY-9" of encl. 15). Pursuant to the said notice, the plaintiff had recalled the said housing F financing and had demanded from the defendant the sum of RM472,819.56 and legal fees.

[25] Pursuant to cl. 7.02 of the sale agreement cum assignment, if the defendant shall commit a default pursuant to s. 7.01 hereof or if any of G the events stipulated in s. 7.01 shall happen and which if was capable of remedy was not remedied within a period of seven days from the date of the notice by the plaintiff requesting remedy of the same, or if not remedied within the time specifically stipulated thereof, if any, in respect of the event in question, the sale price and all other sums payable under the agreement shall become due and payable without H further notice to the defendant to enforce the assignment.

Whether Plaintiff Can Commence Proceedings Concurrently

[26] Section 7.03 of the sale agreement cum assignment provided that I the plaintiff had the right to commence foreclosure proceeding as well as the legal proceedings concurrently. The plaintiff was entitled to

pursue all remedies available against the defendant simultaneously, contemporaneously or successively to recover the monies the plaintiff had granted to the defendant pursuant to the sale agreement cum assignment and all relevant agreements as mentioned herein (see the case of *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81).

Absolute Assignment Of Rights And Title To The Plaintiff

[27] By the deed of assignment duly executed by the plaintiff and the defendant, the defendant as the beneficial owner of the asset had absolutely assigned all his rights, title, and interest whatsoever in and to the asset including all rights and interest of the defendant in the principle agreement ("exh. RY5" of encl. 15) to the plaintiff as security for the payment by the defendant to the plaintiff of the sale price under the sale agreement cum assignment and all other monies payable thereunder (see "exh. RY4" of encl. 15).

[28] Pursuant to the power of attorney created between the defendant and the plaintiff, the defendant had irrevocably appointed the plaintiff as attorney giving the plaintiff all the powers to deal with the asset on behalf of the defendant including the power to transfer, charge and do all things such as to assign, sell, let, lease and so forth of the asset as the plaintiff deem necessary (see "exh. RY6" of encl. 15).

[29] As the defendant had defaulted in making his monthly instalments under the sale agreement cum assignment the plaintiff had exercised its rights to dispose of the asset by way of a public auction dated 16 June 2006 and all notices in respect of the said public auction had been duly served on the defendant. The failure on the part of the defendant to regularise his account had triggered the plaintiff to issue the notice of demand dated 11 March 2003. The said notice was duly received by the defendant (see "exh. RY9" of encl. 15). Pursuant to s. 7.02, of the deed of assignment ("exh. RY4" of encl. 15), the plaintiff as the beneficial owner shall be entitled to sell the asset in any manner the plaintiff deemed necessary to satisfy the outstanding amount remaining due and payable.

[30] The asset was not able to be sold *via* the first five public auctions. However it was only on 16 June 2003 which was the sixth public auction that the plaintiff managed to dispose of the asset at the price of RM70,000 ("exh. RY7" of encl. 15). There was no requirement for the plaintiff to issue new notices of the public auction before the property was disposed of.

Was The Plaintiff's Claim Statute-Barred

[31] The next issue raised by the defendant was that the plaintiff's action was barred by virtue of s. 6(1)(a) of the Limitation Act 1953. The plaintiff's cause of action was to claim the shortfall which was still due and payable by the defendant. The plaintiff's claim was under the deed of assignment and the sale agreement cum assignment the time within which the plaintiff was entitled to claim from the defendant was 12 years and not six years ("s. 21 of the Act").

[32] The next issue to be considered was whether a deed of assignment is a recognised charge under s. 21(1) of the Act. The question is whether deed of assignment were equitable charge or equitable mortgage as envisaged by s. 21(1) of the Act as the words equitable mortgage had not been defined by any written law. It had been held in the case of *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917 "if the borrower has assigned absolutely to the lender all his rights and title in a parcel or piece of immovable property to which no individual title has been issued as security, such an absolute assignment is an equitable mortgage". In *Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [1999] 2 CLJ 1023, His Lordship Gopal Sri Ram JCA said:

> *Chuah Eng Khong v. Malayan Banking Bhd* [1998] 1 CLJ 864, being a decision of the present Federal Court, is plainly binding upon this Court in accordance with the doctrine of precedent. I think this court is equally obliged to accept the decision in *Malayan Banking Bhd v. Zahari bin Ahmad* (*ibid*) as it appears to have been approved *sub silentio* by the Federal Court in *Chuah Eng Khong*. Accordingly, I must respectfully decline Mr Royan's invitation to treat these cases as wrongly decided. These cases are authority for the proposition that an absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage

[33] Therefore in the case of absolute assignment such as the case at hand where an immovable property in respect of which there is no issue of document of title, or no registered charge, or no deposit of issue of document of title, the lender, as equitable mortgagee (and not equitable chargee) may upon default of a borrower, sell the assigned property without an order of the court under O. 83 or O. 31 of the Rules of the High Court 1980. It had been illustrated in the cases that I have quoted that the deed of assignment as in the case at hand was deemed equitable mortgage. Therefore s. 21(1) of the Act would apply to the factual matrix of this case. Based on the foregoing, the time within

which limitation would come into play was 12 years. As the plaintiff's case was premised on the sale agreement cum assignment, the deed of assignment and power of attorney and it involved absolute assignment of an immovable property in respect of which there is no issue of document of title, or no registered charge, or no deposit of document of title, it is an equitable mortgage. Hence the deed of assignment is a recognised mortgage under s. 21(1) of the Act. Therefore the plaintiff's claim against the defendant was not barred by the issue of limitation as claimed by the defendant.

[34] In this case the plaintiff had managed to sell the asset at RM70,000 pursuant to a public auction and the plaintiff was pursuing this claim premised on a claim for money secured by the equitable mortgage. It had been held in the case of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 that the express words of "any action to recover money secured by a mortgage of or charge on land or personal property" in s. 6(5)(b) of the Act has excluded the application of s. 6 of the Act. The action is therefore not founded on a claim on contract. The court went on to state that s. 21(1) of the Act refers to an action to recover moneys secured by a charge which is an action *in personam*, whilst s. 21(2) of the Act specifically refers to foreclosure action in respect mortgaged personal property which is an action *in rem*. Hence the limitation period is 12 years from the date when the right to receive the money accrued or 12 years from the date on which the right to foreclose accrued respectively.

[35] It had been held in the case of *Malayan Banking Bhd v. Wembley Industries Holdings Bhd* [2012] 5 CLJ 956 for a cause of action to recover monies secured by a mortgage, the applicable provision is s. 21(1) and not s. 6. The limitation period is therefore 12 years from the date when the right to receive the monies accrued, which was from the time of the expiry of the notice of demand and the date should run from the time the defendant defaulted in making payment. In the factual matrix before me the computation of the time for the purpose of ascertaining the accrual of the cause of action would be 14 days from 11 March 2003, the day the notice of demand was served on the defendant. So the cause of action would have been 12 years from 24 March 2003 which shall lapse on 23 March 2015. The action being an action premised on equitable mortgage which was filed on 23 July 2010 was still within the period provided under s. 21(1) of the Act. Hence there was no merits in the defendant's contention that the plaintiff's action was barred by s. 6 of the Act.

Was The Plaintiff Entitled To Unearned Profit

[36] The plaintiff was entitled to claim the whole outstanding amount including "unearned profit" in event of default on the part of the defendant to settle the outstanding under the BBA (see *Islamic Banking Practice: From the Practitioner's Perspective, Bank Islam Malaysia Berhad*, 1994) where the plaintiff as the bank which provided the housing financing shall be entitled to claim the whole sum granted to the defendant plus profits (see *Bank Islam Malaysia Bhd v. Adnan Omar* [1994] 3 CLJ 735).

Reduction In Interest Not Considered

[37] As regards the claim by the defendant, that the plaintiff had not taken into consideration the reduction in the interest rate from 10% to 9.5%, the plaintiff submitted that this transaction being a BBA there was no element of interest involved. The defendant too had not proved to the court that he had accepted the offer of 9.5% rate in respect of the profit rate for the sale agreement cum assignment from 10% to 9.5%. Hence there was no evidence before this court that the profit rate in respect of the housing financing was reduced from 10% at 9.5% and accepted by the defendant.

Certificate Of Indebtedness Tainted With Manifest Error

[38] The defendant had also challenged the "certificate of indebtedness" issued by the plaintiff and claimed that there were manifest errors in the said certificate. The defendant had not discharged the burden to prove that the certificate of indebtedness was tainted with manifest errors. Therefore there was conclusive evidence before this court as regard to the amount outstanding owed by the defendant to the plaintiff (see cl. 11.03 of the sale agreement cum assignment). In *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 the court held:

> A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed. In the instant case, the relevant cls. 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England. The certificate of indebtedness, issued in accordance with the aforesaid cls. 27 and 7.03, was lucid enough. There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. (paras 6 & 7)

Conclusion

[39] Having considered the pleadings, the affidavits filed herein and the submissions by the respective counsels from both sides and having given the matter a very careful and serious consideration, I am of the view, based on the facts in this case it is a straightforward and proper case to be disposed of by way of summary judgment under O. 14 of the Rules of Court 2012. Accordingly I allowed the prayers sought in encl. 14 with cost of RM4,000 to be paid by the defendant to the plaintiff.